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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

McGREW PAINT AND ASPHALT CO,
Petitioner,

No. 756 *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

RAILWAY PAINT CO.,
Petitioner,

No. 757 *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

DEDNOX, INC.,
Petitioner,

No. 758 *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

INSUL-MASTIC ROOFING & SIDING CO.,
Petitioner,

No. 759 *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

REPLY OF PETITIONERS TO ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

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REPLY OF PETITIONERS TO ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

It is respectfully submitted that the answer of the Respondent to the Petition for Writs of Certiorari is insufficient in several respects. They will be taken up briefly in their order.

I.

Public Policy.

In Respondent's statement of the case there is presented to the Court a discussion as to the value and meaning of the Illinois Unemployment Compensation Act. The Petitioners have not requested the Court to declare the Act to be unconstitutional as a whole. They believe that the affiliate provision in question can be condemned without destroying the purpose or intent of the Statute, and that even if the Court should hold that this provision (Section 2(e)(5) of paragraph 218 of the Illinois Statute) be generally valid, nevertheless the clause therein "by legally enforceable means or otherwise" is repugnant to the constitution and the words "or otherwise" may be eliminated as unconstitutional without disturbing the general force and effect of the Statute.

II.

The Record.

A.

The Respondent has misconceived the record. It is stated in Respondent's answer (Page 10) that the liability of the Petitioners was not predicated upon the provisions of the present Statute. The Respondent has overlooked the recitation in the report of the Director's representative (R. 4, 5) in which it clearly appears that the Director held that on June 5, 1941 the Petitioners were held liable for payment of contributions commencing in 1937 and continuing through the fourth quarter of 1940. The language of the stipulation (R. 6, 7) entered into on January 5, 1942 embodies the present Statute as amended in 1939. Neither the report of the Director's representative nor the

orders affirming the decision by the Circuit Court nor the opinion of the Supreme Court of Illinois contain any suggestion supporting the statement in Respondent's answer (Page 10), to-wit:

> "The petitioners were in existence prior to that date (Petitioners' Brief P. 20) and their liability was predicated upon the provisions of the statute prior to the said amendment."

The Supreme Court of Illinois, to the contrary, definitely based its decision on the constitutionality of the existing Statute, Section 2(e)(5) of the Illinois Unemployment Compensation Act (Ill. Rev. Stat. 1943, Chap. 48, par. 218). (See opinion of the Supreme Court of Illinois, R. 29, 33).

B.

The Respondent has misconceived the force and effect of the stipulation. It is not based upon ownership, but upon control. (R. 7, par. 2). The stipulation showed that O. V. McGrew was the owner of fifty-five per cent, or less, of the capital stock of three of the corporations (R. 8). There was no stipulation to the effect that he owned all, or substantially all, of the stock of these corporations.

III.

Handy & Harmon v. Burnet, 284 U. S. 136.

Respondent has made no attempt to explain or obviate the force of the language in this decision commented upon in Petitioners' original petition (Pages 6, 7, 16). The language of the Supreme Court commenting upon a comparable statute seems to indicate quite clearly that the provision here in question would be likewise void and inequitable.

IV.

Avent v. Mississippi Unemp. Comp. Comm. 316 U. S. 641.

The Respondent has placed great stress upon this case which dismissed an appeal from the decision of the Supreme Court of Mississippi, in *Mississippi Unemp. Comp. Comm.* v. *Avent*, 192 Miss. 85, 4 So.(2d), 294, 296, 684. An examination of the Mississippi case shows quite clearly that the Appellant in that case, Avent, had admitted that he had separated his business, giving one portion to his wife so as to avoid paying the "unemployment tax" and the Court held (4 So. (2d) 298) that the Act should be interpreted in the light of Avent's "express purpose to evade liability * * *".

There was no discussion of the constitutionality of the section in question in the original decision rendered on October 27, 1941, but on November 24, 1941 (4 So. (2d) 684), the Court held on a suggestion of error that the statute generally was not unconstitutional.

An inspection of both decisions indicates clearly that Mrs. Avent, to whom Mr. Avent had transferred a portion of the business in order to avoid the tax, was only nominally the proprietor of the severed business. The Mississippi case is clearly not in point and it is obvious why under such a factual situation there was no substantial Federal question raised.

It is, as we have pointed out in our original brief, admitted in this record that the Petitioners herein were not organized to evade the tax.

V.

Other Cases Cited by Respondent.

The case of *Carmichael* v. *Southern Coal Company*, 301 U. S. 495, sustains the validity generally of an Unemployment Compensation Statute. There is no discussion of a provision such as is before this Court in the instant case.

The case of *Great A. & P. Company* v. *Grosjean*, 301 U. S. 412 has no application, since there was involved in that case a chain store tax levied on chain stores all controlled by the same corporation.

In the case of *H. E. Butt Grocery Company* v. *Sheppard*, 311 U. S. 608, the Court dismissed an appeal from the Court of Civil Appeals of Texas for want of a substantial Federal question. This case, likewise, is not in point.

The opinion in *Helvering* v. *Clifford*, 309 U. S. 331, which was cited by this Court when it dismissed the appeal in *Avent* v. *Mississippi Unemp. Comp. Comm.*, 316 U. S. 641; 62 S. Ct. 947, indicates that the Court had in mind quite well the facts in the Mississippi case. In this case of *Helvering* v. *Clifford*, 309 U. S. 331, the question involved was whether or not the income of a short-term trust should be taxed to the settlor, the husband, rather than to the wife, the beneficiary. As in the Avent case, the transfer from one spouse to another would not avoid the tax.

VI.

Section 240 (b) of the Federal Internal Revenue Act of 1918.

This Statute (40 Stat. at Large, Vol. 40, 1081), which is largely relied upon (Respondent's answer, Pages 6, 7), is not in point because, as is shown in the case of *Handy & Harmon* v. *Burnet*, 284 U. S. 136, which we have hereto-

fore discussed, the Statute contemplated a situation where substantially all of the stock of two or more corporations was owned or controlled by the same interests.

Conclusion.

The Respondent has cited no decision in which the contentions as to the invalidity of the phrase "by legally enforceable means or otherwise" have been passed upon. The undersigned cannot find any such decision where the invalidity of this provision was raised by a litigant or commented upon by the Court. The Supreme Court of Illinois in this case likewise failed to pass upon the question.

It is respectfully submitted that Writs of Certiorari to the Supreme Court of Illinois should be granted.

Respectfully submitted,

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